IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, et al. Plaintiffs, v. TYSON FOODS, INC., et al. Defendants.	)	Case No. 4:05-cv-00329-GKF-PJC

REPLY IN SUPPORT OF DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT ON COUNTS 1 AND 2 OF THE SECOND AMENDED COMPLAINT AND INTEGRATED BRIEF IN SUPPORT (Dkt. No. 1872)

Plaintiffs' Opposition makes three things clear. *First*, Plaintiffs have no authority to support their over-inclusive interpretation of the CERCLA "hazardous substance" list or their sweeping definition of a CERCLA "facility." *Second*, rather than identify specific record evidence demonstrating the existence of a material dispute, Plaintiffs seek to avoid summary judgment on the basis of unsupported allegations and generalized (often irrelevant) evidence.[1] At this stage, this is insufficient with respect to elements on which Plaintiffs bear the burden of proof. *Sierra Club v. Seaboard Farms*, 387 F.3d 1167, 1169 (10th Cir. 2004). *Third*, Plaintiffs repeatedly urge this Court to overlook their failings of law and evidence because "CERCLA must be construed liberally." Opp. at 10, 13, 17, 22, 24-25. But this instruction, no matter how oft repeated, does not authorize Plaintiffs' non-compliance with CERCLA's requirements.

I. PLAINTIFFS' CLAIMS ARE NOT BASED ON "HAZARDOUS SUBSTANCES"

Plaintiffs' CERCLA claims must be dismissed because the orthophosphates in poultry litter are not CERCLA hazardous substances, and Plaintiffs have not satisfied–or even attempted to satisfy–their burden of proof with respect to the other alleged hazardous substances.

A. The Orthophosphates at Issue in This Case are Not "Hazardous Substances"

Orthophosphates are not on CERCLA's hazardous substance list. *See* 40 C.F.R. § 302.4; Defs.' Motion, Dkt. No. 1872 at 8-12 ("Mot."). Nevertheless, Plaintiffs urge this Court to interpret EPA's list of hazardous substances to include orthophosphates simply because they

[1] Plaintiffs' Opposition seeks to create the appearance of factual disputes through the use of internal-cross references and misleading (or irrelevant) citations. For example, Plaintiffs' response to Undisputed Fact ¶ 20 claims that "[i]t is irrelevant whether the State can identify 'each location' within the IRW to which poultry litter has been applied or its constituents have come to be located." Dkt. No. 1913 ("Opp.") at 7 ¶20. Yet, later Plaintiffs cross-reference this same response for the proposition that "[c]ontrary to Defendants' assertions otherwise, the State has identified areas or parcels of land within the IRW allegedly impacted by the deposition, storage, disposal, placement or migration of hazardous substances." *Id.* at 9 ¶22. Plaintiffs do not identify a single specific location where poultry litter has been applied or come to be located, much less show that it has been applied or come to be located everywhere in the IRW.

(like thousands of other compounds) contain a phosphorus atom (P) as a constituent element (PO_4). Plaintiffs' interpretation suffers from several fatal flaws.[2]

As an initial matter, Plaintiffs' argument contradicts basic principles of chemistry. Most notably, Plaintiffs confuse two distinct forms of matter: pure substances and mixtures. Pure substances, which consist of either elements[3] or compounds[4], each have a fixed composition and properties different from any other substance, and cannot be broken down by physical means. Ex. A ¶¶ 6-8; Ex. A-2 at 12-15.[5] In contrast, a mixture consists of a "combination[] of two or more pure substances [*i.e.* elements or compounds], in which each substance retains its own composition and properties" as part of the whole. Ex. A ¶ 9; Ex. A-2 at 10. As a result, a mixture can be easily separated by physical means. Ex. A ¶ 9; Ex. A-2 at 12.

Once this is understood, it becomes readily apparent that the authorities cited in the Opposition are inapplicable to this case. Each of the cases Plaintiffs cite addresses the presence of hazardous substances as constituents of "mixtures" or "waste solutions," not compounds. Opp. 11-12.[6] For example, in *Betkoski*, the Second Circuit merely affirmed CERCLA liability

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[2] Plaintiffs principally rely on *City of Tulsa v. Tyson Foods, Inc., et al.*, 258 F. Supp. 2d 1263 (N.D. Okla. 2003) (*vacated*). But Plaintiffs admit this vacated opinion has no precedential value. *See* Opp. at 12 n.5. Further, the opinion is not persuasive authority, as the EPA memo discussed below and other authorities presented in Defendants' Motion were not available to Judge Eagan.

[3] An element is a form of matter consisting of a specific kind of atom. Stable forms of elements can exist as single atoms, diatomic molecules or polyatomic molecules. Ex. A ¶ 7; Ex. A-1 at 466; Ex. A-2 at 12. For example, while Phosphorus (element No. 15 on the periodic table) cannot exist in nature as a single atom, it does exist in nature as diatomic or polyatomic molecules of more than one P atom (P_2, P_4, P_8, etc.) referred to as "elemental phosphorus" (CAS No. 7723-14-0). Ex. A ¶ 10; Ex. A-3 at 18; Ex. A-2 at 49.

[4] "A compound is a pure substance consisting of two or more different elements." Ex. A ¶ 8; Ex. A-2 at 15. Orthophosphates (PO_4) contain the constituent elements phosphorus (P) and oxygen (O). Ex. A ¶ 13; Ex. A-6 at 523.

[5] A compound cannot be broken down into simpler substances (*i.e.* elements or other compounds) by physical means, but it can be decomposed by chemical means. An element cannot be decomposed, even by chemical means. *See* Ex. A ¶¶ 6-8; Ex. A-2 at 12-15.

[6] *See B.F. Goodrich v. Betkoski*, 99 F.3d 505, 515-16 (2d Cir. 1996); *B.F. Goodrich v. Murtha*,

for dumping a mixture of municipal solid waste (*i.e.* garbage) "contain[ing] hazardous substances in separable, identifiable forms." *Betkoski*, 99 F.3d at 515-16 ("It is enough that a *mixture or waste solution* contain a hazardous substance for that *mixture* to be deemed hazardous under CERCLA." (emphasis added)).[7] In other words, a defendant cannot escape liability simply by mixing a CERCLA hazardous substance with other materials.[8] This simple proposition is very different from Plaintiffs' argument that every substance that contains a phosphorus atom is hazardous. Plaintiffs' failure to cite any authority to support their argument is not surprising, as it has been repeatedly rejected.[9]

Furthermore, Plaintiffs are incorrect in arguing that Defendants' plain-meaning interpretation of "Phosphorus (CAS #7723-14-0)" is "nonsensical" since "CERCLA is designed to address real 'releases,' not wholly theoretical 'releases.'" Opp. at 12. Both EPA and the Agency for Toxic Substances and Disease Registry ("ATSDR") have confirmed that releases of elemental phosphorus into the environment are very real. For instance, in 1997, the ATSRD identified elemental phosphorus as having been "found in at least 77 of the 1,416 National

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958 F.2d 1192, 1196 (2d Cir. 1992); *Pfohl Bros. Landfill Site Steering Comm. v. Browning-Ferris Indus. of N.Y., Inc.*, 2004 U.S. Dist. LEXIS 28367, *54-55 (W.D.N.Y. Jan. 30, 2004)).

[7] *See Murtha*, 958 F.2d at 1196 (release of municipal waste); *Pfohl Bros.*, 2004 U.S. Dist. LEXIS 28367 at *54-55 (same).

[8] For example, if the PO_4 in poultry manure were a hazardous substance, defendants could not avoid CERCLA simply because PO_4 is mixed with bedding material to create a mixture called poultry litter. This is the full import of the cases cited in Plaintiffs' Opposition. However, CERCLA does not apply to poultry litter because PO_4 is not a hazardous substance to begin with.

[9] Courts have rejected this argument as it applies to "inert solids" which, similar to compounds, cannot be broken down by physical (non-chemical) means. *See Dana Corp. v. Am. Standard, Inc.*, 866 F. Supp. 1481, 1501 (N.D. Ind. 1994) (release of "inert solids" containing constituent hazardous substances is insufficient to establish CERCLA liability; "[i]f a chemical reaction is required to cause such waste, not otherwise listed as a hazardous substance, to generate a hazardous substance, then the plaintiffs must establish the likelihood of such a reaction"); *United States v. New Castle County*, 769 F.Supp. 591, 597-98 (D. Del. 1991) ("inert solid" polyvinyl chloride is not a hazardous substance because there is no evidence that constituent hazardous substances would be released by its disposal).

Priorities List sites identified by the [EPA]."[10] Accordingly, the EPA's listing of elemental phosphorus serves a very real purpose in the regulatory scheme.

As often results from attempts to evade a regulation's plain meaning, Plaintiffs' assertion that all compounds containing a phosphorus atom are "hazardous" produces absurd results.[11]

- EPA's listing of 48 specific phosphorus compounds in 40 C.F.R. § 302.4 would be rendered superfluous. *See* Ex. A ¶ 14 (full list); *see, e.g.*, *Canadyne-Georgia Corp. v. Bank of Am., N.A.*, 174 F. Supp. 2d 1337, 1346 (M.D. Ga. 2001) (defining certain phosphates as hazardous substances where each compound was explicitly listed as a hazardous substance).
- EPA's decision to remove certain phosphorus compounds from the list would be negated. EPA deleted four phosphorus compounds from its proposed list of hazardous substances (beryllium phosphate, ferric glycerophosphate, ferric phosphate and phosphorus pentafluoride), a futile gesture if each was alternatively represented by the listing of phosphorous. *See* 40 Fed. Reg. 59,960, 59,965-66 (Dec. 30, 1975).
- EPA's decision to list 53 hazardous substances as "[element] AND COMPOUNDS" (*e.g.* "CHROMIUM AND COMPOUNDS") or entire categories of substances (*e.g.* "Lead Compounds") would have been unnecessary, as any compound containing the listed element would be automatically included on the list. *See* Ex. A ¶ 15 (full list); *City of New York v. Exxon Corp.*, 766 F. Supp. 177, 182-83 (S.D.N.Y. 1991) (compounds containing cadmium, chromium or lead are hazardous substances under CWA's listing of "cadmium and compounds," "chromium and compounds" and "lead and compounds").
- The statutory explanation of how to interpret the explicit references to "compounds" on the hazardous substances list would be meaningless. *See* 42 U.S.C. § 7412(b)(1) ("For all listings above which contain the word 'compounds' and for glycol ethers, the following applies: Unless otherwise specified, these listings are defined as including any unique chemical substance that contains the named chemical (i.e., antimony, arsenic, etc.) as part of that chemical's infrastructure.").
- Including every compound containing phosphorus would require the classification of "all living organisms" as CERCLA hazardous substances, Ex. A ¶ 12; Ex. A-2 at 964, as well as thousands of human food products (*e.g.* butter, cheese, eggs, milk, etc.), *see* Mot. Ex. 10, and all commercial fertilizers, *see* Ex. A ¶ 12; Ex. A-2 at 965; *see, e.g.*, Ex. D.[12]

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[10] Ex. B at 1 ("[Elemental phosphorus] can enter the environment when it is made, used in manufacturing or by the military, or accidentally spilled during transport and storage."); *see, e.g.*, Ex. C (documenting presence and dangers of elemental phosphorus at a superfund site).

[11] Unable to explain these results, Plaintiffs claim that the canons of statutory construction (*e.g. expressio unius*, etc.) are "not inflexible" and should be disregarded here because they "would run counter to the fact that CERCLA is a remedial statute that courts construe liberally." Opp. at 13. This rejection of plain meaning is contrary to Supreme Court and Tenth Circuit caselaw. *Barnhart v. Peabody Coal, Co.*, 537 U.S. 149, 168 (2003); *Seneca-Cayuga Tribe of Okla. v. Nat'l Indian Gaming Comm'n*, 327 F.3d 1019, 1034 (10th Cir. 2003).

[12] Plaintiffs attempt to justify the classification of these, and other non-harmful compounds, as

- Applying Plaintiffs' construction to other elements listed without their compounds would turn table salt, sun block and myriad other products into CERCLA hazardous substances. (Table salt (NaCl) contains the element chlorine, while sun block (Zinc Oxide, ZnO_2) contains zinc, and both of these elements are listed in 40 C.F.R. § 302.4).

The plain text of 40 C.F.R. § 302, EPA's actions and the absurdities that would result from Plaintiffs' interpretation clearly demonstrate that the hazardous substances list does not include all phosphorus compounds within the listing for elemental phosphorus. *See also* Mot. at 9-11.

EPA expressly confirmed this interpretation in its July 18, 2006 memorandum. *See* Mot. at 11-12, Ex. 23. Plaintiffs ask this Court to ignore EPA's explicit instructions on the proper interpretation the term "phosphorus" in EPA's hazardous substances list because Defendants informed the EPA of Plaintiffs' allegations in this case. *See* Opp. at 14-15. Contrary to Plaintiffs' assertion, the fact that EPA issued its memorandum in direct response to Plaintiffs' claims is conclusive proof that Plaintiffs' interpretation of EPA's list is wrong. Moreover, by Plaintiffs' own admission, EPA's memo is entitled to *Skidmore* deference. *See id.* at 14; Mot. at 11-12. Such deference is controlling where, as here, the agency interprets its own regulations.[13] Finally, EPA's memo is "inconsistent with the only judicial decision to directly address the issue," Opp. at 15, precisely because EPA issued the memo to respond to the vacated *City of Tulsa* opinion and Plaintiffs' claims in the present litigation.

B. Plaintiffs Have Failed to Provide Evidence Sufficient to Establish CERCLA Liability for Any of the Other Alleged Hazardous Substances

The only substances that Plaintiffs even mention in their Opposition other than orthophosphates are "arsenic, copper and zinc (and compounds thereof)." Opp. at 10 n.3. Plaintiffs argue that summary judgment is inapplicable as to these particular substances because

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hazardous substances by referencing *U.S. v. Alcan Aluminum Corp.*, 964 F.2d 252, 260 (3d Cir. 1992), as having "dismiss[ed] a similar argument." Opp. at 13-14. This argument is misleading, given that the dispute never concerned the nature of the substances at issue (copper, chromium, lead and zinc) all of which are expressly listed as hazardous substances.

[13] *See Barnhart v. Walton*, 535 U.S. 212, 217 (2002); *Auer v. Robbins*, 519 U.S. 452, 456 (1997).

"[t]he State has presented undisputed evidence that it incurred response costs in responding to the release of these substances." *Id.* (citing *id.* at 1 ¶4). However, the evidence Plaintiffs cite does not identify the incurrence of CERCLA "response costs."[14] Moreover, even if the cited evidence did reference recoverable "response costs," such vague assertions, unsupported by record evidence, cannot satisfy Plaintiffs' burden of proof at this late stage of the litigation.[15] *Seaboard Farms*, 387 F.3d at 1169. Accordingly, Plaintiffs' claims on these substances must fail.

Plaintiffs concede that CERCLA liability cannot be established for the other "hazardous substances" alleged in their complaint. Plaintiffs do not deny the undisputed fact that "[n]either 'microbial pathogens' [nor] 'bacteria' are listed on EPA's 'Hazardous Substances List.'" *See* Opp. at 2 ¶6; Mot. at 2 ¶¶6, 8. Likewise, Plaintiffs previously admitted that "elemental nitrogen is not on the CERCLA Hazardous substances list." Ex. J at No. 12. Indeed, Plaintiffs do not attempt to identify any evidence to establish the required elements for CERCLA liability with regard to their non-phosphorus "hazardous substances," including that (1) each substance is present in poultry litter and (2) the release or threatened release of each substance caused an

[14] *First*, the Olsen Declaration (Opp. Ex. 4 at ¶6) is wholly immaterial to Plaintiffs' claim because the State of Oklahoma has not, and will never, incur the costs of the investigation conducted by Camp Dresser & McKee Inc. ("CDM"). CDM is paid by Plaintiffs' outside counsel, and Plaintiffs' contract makes clear that this liability can never be passed to the State. *See* Ex. E at ¶¶ 1-3. 42 U.S.C. § 9607(a)(4)(A) provides that CERCLA "response costs" must be "incurred by the United States Government or a State." *Second*, Plaintiffs' reliance on the Duncan and Smithee Declarations (Opp. Exs. 6 & 7) is misplaced because Plaintiffs have not identified any evidence to prove that the costs of the investigations and monitoring programs referenced therein were caused by poultry litter. *See* 42 U.S.C. § 9607(a)(4) (requiring evidence of "a release, or a threatened release which cause[d] the incurrence of response costs"). To the contrary, all available evidence suggests that these state-wide programs were initiated in accordance with federal reporting requirements, *see* 33 U.S.C. §§ 1313(d), 1315(b)(1), and undertaken without reference to Defendants' alleged conduct. *See* Opp. Ex. 6 ¶¶2(a)-(c); Opp. Ex. 7 ¶¶2(a)-(e), 4; *see also, e.g.*, Ex. F at 5-7, App. B; Ex. G at vii-viii, 24-27.

[15] Defendants have repeatedly requested the production of all information related to any "response costs" incurred by the State of Oklahoma, yet no such evidence has been produced. *See* Ex. H; Ex. I at No. 4; Dkt. No. 1854, at 21-22, nn.4-10.

injury or the incurrence of response costs. *Compare* Mot. at 6-8, *with* Opp. at 10-15. Plaintiffs further confirm this in their Opposition to Defendants' statute of limitations motion, where they list phosphorus as the only constituent of concern in this case. *See* Dkt. No. 1917 at 8. Accordingly, summary judgment should be granted on Plaintiffs' CERCLA claims predicated upon other alleged "hazardous substances."

II. PLAINTIFFS CANNOT SATISFY THEIR BURDEN TO PROVE THE EXISTENCE OF A CERCLA-COVERED "RELEASE"

Plaintiffs are wrong that "Defendants do not dispute that their waste disposal practices constitute a 'release' to lands and waters under CERCLA." Opp. at 16. To the contrary, Defendants' Motion demonstrates that Plaintiffs cannot satisfy their burden to prove the existence of a CERCLA "release," because the alleged[16] conduct represents the "normal application of a fertilizer" and cannot constitute a "release" under 42 U.S.C. § 9601(22).

A. The Land Application of Poultry Litter in Accordance with Past Practice and State Laws and Regulations Constitutes the "Normal Application of a Fertilizer"

Plaintiffs are incorrect in arguing that the "normal application of fertilizer" requirement is a statutory exception for which Defendants carry the burden of proof. *See* Opp. at 16-18. The statutory structure of 42 U.S.C. § 9601(22) clearly sets forth the "normal application" requirement as part of the definition of a "release," and not as an exception to CERCLA liability. By limiting "releases" to those applications of fertilizer that are not "normal," Congress alleviated farmers of the burden of proving that each use of fertilizer is not a CERCLA violation. Under Plaintiffs' interpretation, every application of animal manure would presumptively violate CERCLA, exposing big and small farmers alike to lawsuits and harassing settlement demands.

The parties clearly disagree as to the *legal* definition of the term "normal" in 42 U.S.C. §

[16] For the purposes of this analysis, Defendants merely assumed Plaintiffs' allegations *arguendo*. *See* Ex. K ¶¶ 70, 79. Plaintiffs' characterization of Defendants' statements as an admission of such allegations is therefore incorrect. *See* Opp. at 16, 18.

9601(22).[17] Plaintiffs contend that CERCLA's reference to the "normal application of a fertilizer" incorporates the opinions of their expert, Dr. Gordon Johnson. Under Dr. Johnson's "fertilizer requirements," the application of a fertilizer containing any nutrient that a crop does not require to satisfy its *minimum* agronomic needs constitutes disposal, not fertilization. Opp. at 18-19. But no government entity or other agronomist has accepted this theory, for the simple reason that fertilizers usually contain multiple nutrients and crops receive benefits from many of those nutrients, not just one. Oklahoma regulates the use of poultry litter as a fertilizer on this very basis, as it expressly permits its application to crops that have satisfied the *minimum* agronomic need for phosphorus (65 STP) because it recognizes that the use of poultry litter at levels above 65 STP can further benefit crops without causing negative environmental impact. *See* Ex. L at 5-6, 28-32; Okla. Admin. Code § 35:17-5-1. Dr. Johnson's theory would eviscerate the protections Congress incorporated into CERCLA for farmers using manure-based fertilizers and is contrary to Oklahoma law. *See* Mot. at 17; Ex. M at 507:5-17, 508:3-8; Ex. N at 84:4-7.

The better understanding of the phrase "normal application of fertilizer" looks to the objective requirements imposed by current and past state laws and regulations and the customary usage of farmers in accordance with those laws. *See* Mot. at 15-18. Because Plaintiffs have failed to adduce specific evidence demonstrating departures from these standards, Plaintiffs have failed to demonstrate a CERCLA "release." *Id.*[18] Counts 1 and 2 must therefore be dismissed.

III. PLAINTIFFS HAVE NOT IDENTIFIED A PROPER CERCLA "FACILITY"

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[17] Plaintiffs also misleadingly claim that poultry litter is not a "fertilizer" under Oklahoma law. Opp. at 18-19. Numerous Oklahoma laws and agencies expressly approve the use of poultry litter as fertilizer. *See* Mot. at 3 ¶¶ 16-17; Dkt. No. 1876 at 5-7 ¶¶ 11-12. The Oklahoma Secretary of Agriculture has clarified that the single statute Plaintiffs cite for this claim, 2 Okla. Stat. § 8-77.3(11), is "aimed at the manufacturers and distributors of commercial fertilizers" and has no applicability "in the area of poultry waste regulation." Ex. O at 1.

[18] Although Plaintiffs contend that "[s]ubstantial record evidence demonstrates poultry waste is not being managed in accordance with Oklahoma law," Opp. at 5 ¶17 (citing ¶¶12-14, 19-21), the referenced paragraphs contain no evidence of any violation of Oklahoma or Arkansas law.

Plaintiffs fail to identify any authority to support their proposed definitions of the alleged CERCLA "facility." Additionally, Plaintiffs' overbroad definitions would actually diminish—not further—CERCLA's remedial goals by eviscerating the statute's minimal causation requirement (which ensures identification of responsible parties) and permitting claims to proceed without evidence of the specific locations of the releases (which must be enjoined) or where hazardous substances have come to be located (which must be remediated).

Plaintiffs' only support for their attempt to define the entire IRW as a single CERCLA "facility" are references to out-of-context statements from inapposite cases, each of which can be classified into one of the following categories: (1) instances in which courts treated property comprised of uncontaminated and contaminated land as a single CERCLA "facility" because the entire property was subject to homogeneous ownership, operation and control;[19] and (2) instances in which courts treated separately owned and operated, but contiguous, properties as a single CERCLA "facility" because hazardous substances were released from a single location and migrated to the contiguous property.[20] Neither of these categories supports Plaintiffs' contention that the entire IRW can be defined as a single CERCLA "facility."[21]

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[19] Opp. at 22-24; *Seaboard Farms*, 387 F.3d at 1168, 1174 (defining facility to include "two farms located on contiguous sections of land" that were "[s]olely owned by Seaboard, [and] managed and operated as one facility, with one particular site purpose"); *Axel Johnson, Inc. v. Carroll Carolina Oil Co., Inc.*, 191 F.3d 409, 419 (4th Cir. 1999) (treating a property, owned and operated at all relevant times by a single party, as a single "facility"); *United States v. Twp. of Brighton*, 153 F.3d 307, 313 (6th Cir. 1998) ("[the owner] used the entire property as a dump, and so it is appropriately classified as a single facility"); *Cytec Indus., Inc. v. B.F. Goodrich Co.*, 232 F. Supp. 2d 821, 836 (S.D. Ohio 2002) ("the definition of a facility will be the entire site or area, including single or contiguous properties, where hazardous substances have been deposited as part of the same operation or management"); *see also* Mot. at 23 (citing additional cases).

[20] Opp. at 22-24; *Pakootas v. Teck Cominco Metals Ltd.*, 452 F.3d 1066, 1069-70, 1074 (9th Cir. 2006) (defining the "Upper Columbia River Site" as a single "facility" where a single defendant discharged hazardous substances directly into the river from a single location, and those hazardous substances migrated to a contiguous portion of the Columbia River); *Nutrasweet Co. v. X-L Eng'g Corp.*, 933 F.Supp. 1409, 1417-18 (N.D. Ill. 1996); *see also* Mot. at 23-24.

[21] Plaintiffs argue that there is an issue of fact on whether the IRW is a single 'facility'" because

The courts have rejected similarly overbroad CERCLA facilities for these very reasons.[22] Tellingly, Plaintiffs do not address these cases, let alone demonstrate that Plaintiffs have met their burden to prove the existence of a causal nexus between the facility, proper defendant(s) and a release that caused an injury or the incurrence of response costs. *See* Opp. at 21-24.

Plaintiffs' alternative attempt to combine multiple non-contiguous facilities into a single "super-facility" is also not permitted under CERCLA. The Opposition fails to cite any statutory or precedential authority for this novel theory, or for Plaintiffs' contention that 42 U.S.C. § 9604(d)—which authorizes only the President, at his discretion, to treat two or more non-contiguous facilities within the same geographic region as one—should be judicially expanded to grant that power to other plaintiffs. *See* Opp. at 25.

Finally, summary judgment is appropriate because Plaintiffs have not identified evidence to establish the location of any of these purported "non-contiguous facilities--*i.e.*, the grower buildings, structures, installations and equipment in the IRW, as well as the land where poultry waste has been applied." Opp. at 25 & n.19;[23] *see Seaboard Farms*, 387 F.3d at 1169.

"hazardous substances have come to be located throughout the watershed." Opp. at 24 (citing *id.* at 7-10 ¶¶19-21). But, Plaintiffs are wrong for two reasons. *First*, in order to constitute a single CERCLA "facility" comprised of separately owned and operated, but contiguous, properties, the alleged hazardous substances must have come to be located throughout the *entire* IRW as a result of migration across each contiguous piece of property in the defined "facility." *See infra* at 9 n.20. Plaintiffs admit such a result is impossible given the multitude of land uses in the IRW. *See* Opp. at 1 ¶2; *compare* Mot. at 4 ¶19, *with* Opp. at 7 ¶19 ("poultry litter is not land applied on every parcel [of land in the IRW];" poultry litter is only applied on pasture land). *Second*, even if such a result were possible, Plaintiffs have nevertheless failed to satisfy their burden of proof to "set forth specific facts showing" that hazardous substances have come to be located throughout the *entire* IRW. *Seaboard Farms*, 387 F.3d at 1169.

[22] *See, e.g., New Jersey Turnpike Auth. v. PPG Indus., Inc.*, 197 F.3d 96, 105 (3d Cir. 1999); *United States v. Iron Mtn. Mines, Inc.*, 987 F.Supp. 1263, 1270 (E.D. Cal. 1997); Mot. at 21-22.

[23] Plaintiffs fail to identify any evidence showing the specific location(s) where poultry litter has been applied in the IRW or otherwise come to be located. Opp. at 7-10 ¶¶19-21, 25. Notably, Defendants repeatedly requested the production of all such evidence on multiple occasions during the discovery period. *See, e.g.*, Ex. P at Nos. 7, 9; Ex. Q at Nos. 7, 9; Ex. R at Nos. 7-14.

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I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

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